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In the Supreme Court of the United States

OCTOBER TERM, 1994

PHILLIPS PETROLEUM COMPANY, PETITIONER

v.

GARY JOHNSON, AREA MANAGER, DALLAS AREA COMPLIANCE OFFICE, MINERALS MANAGEMENT SERVICE, ET AL., RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether 28 U.S.C. § 2415(a), which imposes a six-year statute of limitations upon "any action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract," applies to a claim asserted by the federal government for royalties under a mineral lease.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties appearing in the caption of the case, the following were parties to the proceeding below:

Atlantic Richfield Company
United States Department of the Interior
United States Minerals Management Service
Nick L. Kelly, Area Manager, Dallas Area Compliance Office, Minerals Management Service, United States Department of the Interior
Barry Williamson, Director, Minerals Management Service, United States Department of the Interior
Manuel Lujan, Jr., Secretary of the Interior

The individual defendants were named only in their official capacities.

Phillips Petroleum Company has no parent company, and has the following non-wholly owned subsidiaries:

Alyeska Pipeline Service Company
Arctic LNG Transportation Company
Bissendorf Biosciences GmbH
Canyon Reef Carriers, Inc.
Chisholm Pipeline Company
Colonial Pipeline Company
Cristal Ltd.
Dixie Pipeline Company
Eagle Sun Company Ltd.
East Texas Salt Water Disposal Company
Explorer Pipeline Company
FLTG Inc.
Heat Transfer Research, Inc.
Kenai LNG Corporation
Multinational Gas and Petrochemical Services Ltd.
Norland GmbH für Grundbesitz und Industrieanlagen
Norpipe A.S.

Norpipe Petroleum UK Ltd.
Norsea Gas A/S
Norsea Gas GmbH
Norsea Pipeline Ltd.
Oil Casualty Insurance Ltd.
Oil Insurance Ltd.
Phillips-Imperial Petroleum Ltd.
Phillips Gas Company
Phillips Morrison Resources Ltd.
Phillips P.C. Resources Ltd.
Phillips Petroleum Singapore Chemicals (Private) Ltd.
Phillips Sumika Polypropylene Company (Partnership)
Phillips-San Juan Partners, L.P.
Piro Implementation, Inc.
Polar LNG Shipping Corporation
Prince William Sound Oil Spill Response Corporation
Renolit-Haus AG
Renolit-Haus GmbH
Southern and Phillips Gas Limited
Sweeny Olefins Limited Partnership
Venezoil, C.A.
Western Desert Operating Petroleum Company
(WEPCO)

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PETITION FOR A WRIT OF CERTIORARI

Phillips Petroleum Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The supplemental opinion of the court of appeals on rehearing (App., *infra*, 1a-4a) is not reported. The prior opinion of the court of appeals (App., *infra*, 5a-14a) is reported at 22 F.3d 616. The opinions of the district court (App., *infra*, 15a-78a) and the orders of the Minerals Management Service (App., *infra*, 79a-100a) are unreported.

JURISDICTION

The court of appeals entered its initial judgment on June 10, 1994. See App., *infra*, 5a-14a. Thereafter, the court of appeals granted rehearing, entering a modified judgment on September 7, 1994. See App., *infra*, 1a-4a. A timely petition for rehearing was denied on November 1, 1994. See App., *infra*, 101a-103a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 2415(a) provides in pertinent part:

> Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * * .

STATEMENT

This case presents the question whether the United States has an unlimited time to collect past-due royalties on federal mineral leases. There is no specific federal statute of limitations for the collection of lease royalties. There *is*, however, a general six-year limitation on contract actions brought by the United States. 28 U.S.C. § 2415(a). A mineral lease is a contract, and the obligation to pay royalties is a covenant under that contract.

The Fifth Circuit held, nonetheless, that Section 2415(a) does *not* apply to the collection of royalties due under lease contracts. That conclusion relied upon the practice followed

by the Minerals Management Service ("MMS") of the Department of the Interior in collecting past-due, unpaid or underpaid mineral lease royalties. After identifying a suspected underpayment, the MMS issues an administrative order to pay the royalties. If the lessee does not pay, the MMS files an action in district court seeking enforcement of its order. Often, as in this case, the enforcement action is a counterclaim to the lessee's complaint seeking judicial review of the order to pay.

According to the Fifth Circuit, in this chain of events the United States never files an "action for money damages" that could be barred by Section 2415(a). As a consequence, the government can assess unpaid royalties that became due in the distant past and then, without any time limitation whatsoever, demand and enforce payment from lessees.

The Tenth Circuit disagrees with this surprising result; within the jurisdiction of that court, a lessee's liability for royalties is not perpetual. On the contrary, the running of the limitations period may be a "defense to payment" sought by the MMS in administrative proceedings or subsequent litigation. *Mesa Operating Limited Partnership* v. *Lujan*, 17 F.3d 1288, 1291 (10th Cir. 1994). In that circuit, the MMS's right to collect past royalties expires six years after the agency knew or reasonably should have known of an underpayment. *Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858 (1993). See 28 U.S.C. § 2416(c). Outside the mineral leasing context, other circuits have given Section 2415(a) a more flexible, common-sense scope than the Fifth Circuit did here. And the District of Columbia Circuit has rejected an argument that would have allowed the government to avoid a different but analogous statute of limitations by using administrative instead of judicial procedures in the first instance. *3M Co.* v. *Browner*, 17 F.3d 1453 (1994).

The question presented by this case is of critical importance to United States energy producers. Without the pro-

tection of a statute of limitations, their accounts are open forever, and they are forever vulnerable to government demands to pay stale contractual obligations. This Court should grant certiorari to resolve the conflict among the circuits and to ensure that the United States may not evade the general statute of limitations for contract actions by administrative sleight-of-hand.

A. The Federal Mineral Leasing Program

The federal government has leased certain mineral rights on the public lands since the enactment of the Mineral Leasing Act of 1920, 30 U.S.C. §§ 181-287. More than 1½ billion acres of federal and Indian lands and the Outer Continental Shelf ("OCS") come within the federal mineral leasing jurisdiction; approximately 100 million acres are actually leased, one-third of which are offshore.[1] See 1 ROCKY MOUNTAIN MINERAL LAW FOUNDATION, LAW OF FEDERAL OIL & GAS LEASES § 1.01, at 1-1 to 1-2 (1992).

Although dozens of kinds of minerals are subject to leases, oil and gas leases make up the vast majority both of leases and of royalties paid; coal leases account for most of the remaining royalties. U.S. DEPARTMENT OF THE INTERIOR, MINERALS MANAGEMENT SERVICE, MINERAL REVENUES 1993: REPORT ON RECEIPTS FROM FEDERAL AND INDIAN LEASES 11, 95 (1994) ("MINERAL REVENUES 1993"). Federal lessees produce a significant proportion of United States domestic energy production: one-third of the natural gas, 30% of the coal, and 20% of the oil. *Id.* at 25.

Federal mineral lessees pay a royalty expressed as a percentage of the value of the minerals extracted. Federal mineral leases generally give the Secretary of the Interior the

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[1] For simplicity, we refer to all leases supervised by the Department of the Interior as "federal leases" whether the leases are on federal lands, Indian lands, or the Outer Continental Shelf.

right to set a minimum value of production against which the royalty shall be computed. The leases also incorporate by reference the relevant statutes and regulations, including those promulgated while the lease is in effect.[2] The regulations confirm the Secretary's right to set the value of gas produced on a federal lease. See 30 C.F.R. § 206.153 (1994).

The MMS is responsible for collecting lease royalties. Lessees must report their gas production and pay royalties every month.[3] 30 C.F.R. §§ 206, 216-218 (1994). The MMS may audit royalty reports and determine whether additional royalties should have been paid. *Id.* §§ 206, 217. Although the Federal Oil and Gas Royalty Management Act ("FOGRMA") requires lessees to retain records for only six years after generating them, the MMS may extend the record retention period by beginning an audit or investigation involving particular records. 30 U.S.C. § 1713(b).

The MMS often uses the following procedure to assess and collect allegedly underpaid royalties: After the agency has identified a possible underpayment through an audit or other review, the MMS area compliance officer notifies the lessee of a preliminary determination of liability and invites the lessee to submit further information if it believes that the determination is in error. After considering any response,

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[2] In addition to the Mineral Leasing Act, the principal statutes governing federal mineral leasing are the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359, two acts providing for the leasing of Indian lands, 25 U.S.C. §§ 396-396g, the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331-1356, and the Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. §§ 1701-1757. The last two are most pertinent to this case.

[3] Because only gas leases are at issue in this case, we refer only to gas production. Similar principles govern leases for other minerals.

the MMS area compliance officer issues a final liability determination and order to pay.

At that point, the lessee is entitled to appeal the determination through the Interior Department. See 30 C.F.R. §§ 243, 290 (1994). Because the payment order is not automatically stayed pending administrative appeal, however, the compliance officer's order is final and may be judicially reviewed under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, without the exhaustion of administrative appellate remedies. See App., *infra*, 36a n.6.

The MMS payment order, though final agency action, is not self-executing but stands only as a determination of the underlying obligation along with a demand for payment. See, *e.g.*, *Arch Mineral Corp.* v. *Lujan*, 911 F.2d 408, 411 (10th Cir. 1990); *Mobil Exploration & Producing U.S., Inc.*, 119 I.B.L.A. 76, 81 (1991). In order to collect the amount due from the lessee, the MMS must seek enforcement of its order from a federal district court. See 30 U.S.C. § 1722. The MMS also can impose civil penalties for the failure to correct a violation such as the underpayment of royalties. See *id.* § 1719. Civil penalties are governed by a separate statute of limitations in the FOGRMA: any action to recover penalties must be brought within six years "after the date of the act or omission which is the basis for the action." *Id.* § 1755.

B. Proceedings Below

1. In 1989, the MMS Dallas Area Compliance Office issued three orders demanding that Phillips Petroleum Company recalculate and pay additional royalties on three groups of offshore leases. App., *infra*, 79a-91a, 96a-100a. The first two orders, dated June 5 and September 26, recounted the results of "sample audits" that, the MMS claimed, indicated that Phillips had failed to pay royalties on reimbursements received for production-related costs. App., *infra*, 86a-91a, 96a-100a ("Production Reimbursement

Orders"). Although the MMS permanently maintains four auditors at Phillips' headquarters, App., *infra*, 49a, the orders required Phillips itself to review its royalty calculations beginning July 25, 1980, for all leases acquired in two mergers, and to pay any additional royalties due on the relevant reimbursements within 30 days of each order. *Id.* at 88a, 98a. The third order, issued September 27, 1989, stated that Phillips had undervalued natural gas liquid products that were used internally without being sold, and required Phillips to recalculate and pay royalties on all of its offshore leases from January 1977 through February 1988. *Id.* at 35a, 79a-85a ("NGLP Order").[4]

Phillips did not appeal the MMS orders within the Department of the Interior, but instead filed lawsuits in the United States District Court for the Northern District of Texas in July, September, and October 1989. The jurisdiction of the district court was founded on 28 U.S.C. §§ 1331 and 1346. Each action sought a declaratory judgment that the pertinent order was invalid and an injunction against the enforcement of that order.[5] Phillips' three actions were consolidated with a similar action filed by the Atlantic Richfield Company. App., *infra*, 35a.

Both Phillips and the government moved for summary judgment. In an order dated September 18, 1992, the district court held that the MMS had the authority to order Phillips to recalculate past royalties and that the valuation method required in the NGLP Order was valid. App., *infra*, 32a-78a. The court granted partial summary judgment to Phillips, however, declaring that the statute of limitations

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[4] An order issued June 12, 1989, imposed late payment penalties on Phillips for certain 1982-1984 royalty underpayments that Phillips had remitted earlier in 1989. App., *infra*, 92a-95a.

[5] The parties agreed that the MMS orders were final for the purpose of judicial review. App., *infra*, 36a n.6.

contained in 28 U.S.C. § 2415(a) "bars the Government from bringing any causes of action * * * based on royalty payments on the leases at issue here that are due and owing for more than six years." App., *infra*, 52a.

Several weeks earlier, while the summary judgment motions were pending, the government had moved to amend its answer to add "omitted counterclaims" for the enforcement of the MMS orders. The district court granted that motion shortly after deciding the initial summary judgment motions. App., *infra*, 30a-31a.

The government then moved for summary judgment on its counterclaims for enforcement of the payment orders. Despite its earlier ruling, the district court held that these claims were not barred by Section 2415(a). App., *infra*, 18a-20a. The court thereupon ordered Phillips to "recompute and pay any unpaid royalties" in compliance with the MMS orders. *Id.* at 15a-17a.

2. The Fifth Circuit reversed in part. In its initial opinion, the court held that the production valuation method used in the NGLP Order violated the Administrative Procedure Act. App., *infra*, 5a-14a. The court acknowledged but did not dispose of Phillips' argument that Section 2415(a) barred the enforcement of the MMS orders. *Id.* at 6a.

Both Phillips and the government petitioned for rehearing, noting that the Production Reimbursement Orders did not involve the rejected valuation procedure. On rehearing, the court of appeals affirmed the remainder of the district court's order, holding that Section 2415(a) did not apply to the MMS's collection of disputed royalties in this case.[6] App., *infra*, 1a-4a.

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[6] The court of appeals again failed to decide whether the MMS had the authority to force Phillips to audit itself to determine whether it owed additional royalties.

The court of appeals began by holding that the government's effort to obtain enforcement of its asserted rights to additional payments under the lease did not involve the filing of a "complaint" and therefore was not subject to the strictures of Section 2415(a). App., *infra*, 3a. According no independent significance to the government's counterclaim, the court stated that the action before it was a "suit * * * for declaratory judgment brought by Phillips and ARCO." *Id.* at 3a n.1. "[M]oreover," the court added, "the agency order cannot be construed as a complaint." *Ibid.*

The court of appeals also held that an action seeking "monies due under a contract with the government" was not an "action for money damages." App., *infra*, 3a-4a. The court reasoned that "money damages" referred only to "a sum of money used as compensatory relief" and that the "contractual obligations" to pay royalties "cannot be considered compensatory." *Id.* at 4a.

REASONS FOR GRANTING THE PETITION

Statutes of limitations are "fundamental to a well-ordered judicial system." *Board of Regents* v. *Tomanio*, 446 U.S. 478, 487 (1980). Accordingly, Congress enacted 28 U.S.C. § 2415(a) in order to "equalize[ ] the litigative opportunities between the Government and private parties." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 521 (1967). Section 2415(a) covers "Government litigation [that] arises out of activity which is very similar to commercial activity"; "fairness and equity" require "that the law should provide a period of time within which the Government must bring suit on claims," as it does for the claims of private individuals. S. Rep. No. 1328, 89th Cong., 2d Sess., reprinted in 1966 U.S.C.C.A.N. 2502, 2503; H.R. Rep. No. 1534, 89th Cong., 2d Sess. 4 (1966).

The Fifth Circuit's narrow and grudging reading of Section 2415(a) deprives federal mineral lessees of the repose afforded others who contract with the United States. In the

Fifth Circuit—the circuit where most federal oil and gas resources lie—the government's remedies for breach of the covenant to pay royalties have no time limit at all. By giving more weight to procedural form than to the "strong policies of repose" (*Tomanio*, 446 U.S. at 487) that undergird the general statute of limitations for contract actions, the Fifth Circuit has placed American energy producers eternally at the mercy of MMS auditors and bureaucrats.

This Court should not let this state of affairs stand without review, especially as has it resulted in a conflict between the two circuits whose decisions are most important in the area of mineral leasing. The Tenth Circuit adheres to the contrary view that Section 2415(a) does in fact apply to MMS royalty collection efforts. Phillips thus is vulnerable to an action to enforce an order to pay stale royalties if that action (or counterclaim) is brought in the district where Phillips' OCS leases are located, but not if the action is brought where Phillips itself is located. The Fifth Circuit's stilted reading of Section 2415(a) also conflicts with common-sense interpretations of other circuits that have been more mindful of Congress's intent to level the playing field between the government and private litigants.

Moreover, the Fifth Circuit's decision is of paramount importance to the energy industry in the United States. Federal leases account for between 20 and 33 percent of domestic fossil fuels. The MMS's production valuation regulations are undeniably complex, as are the agency's interpretations. To give the MMS *carte blanche* to collect additional royalties years after the fact injects unnecessary uncertainty into an already volatile industry.

Mineral leases clearly come within the universe of contracts covered by Section 2415(a), and a reasonable interpretation of the statute requires its application to the royalty collection efforts at issue here. This Court should grant review to settle this important question.

A. The Decision of the Fifth Circuit Conflicts With Decisions of Other Circuits That Have Considered Section 2415(a)

1. The decision below creates a conflict between the two most important circuits for the administration of federal mineral leases. At present, the United States is subject to Section 2415(a) when it attempts to collect past royalties in the Tenth Circuit but not when it attempts to do the same thing in the Fifth Circuit. Phillips and other lessees are eternally at peril of lawsuits seeking past royalties for their leases in (and offshore from) Texas or Louisiana, but their liability for royalties due on leases in Oklahoma or Colorado is limited in time. This Court should resolve that conflict and impose a uniform rule of limitation.

At the outset, we note that the Fifth Circuit's failure to publish the decision below in no way diminishes the conflict with the Tenth Circuit. Unpublished decisions are binding on subsequent Fifth Circuit panels. *E.g.*, *Hodges* v. *Delta Airlines*, 4 F.3d 350, 355 (5th Cir. 1993), rehearing en banc granted, 12 F.3d 426 (1994); *United States* v. *Don B. Hart Equity Pure Trust*, 818 F.2d 1246, 1250 (5th Cir. 1987); 5th Cir. R. 47.5.3. There is no possibility that the government, which necessarily is a party to all royalty litigation, would be unaware of the decision. Accordingly, because the Fifth Circuit will continue to follow the decision below, there is no sound reason for this Court to await further action by the Fifth Circuit before considering this important issue.

In direct contradiction to the Fifth Circuit, the Tenth Circuit has taken the view that, because "oil and gas leases are contracts," Section "2415(a) is the controlling statute of limitations" applicable to MMS efforts to collect unpaid royalties. *Phillips Petroleum Co.* v. *Lujan*, 4 F.3d 858, 860 & n.1 (10th Cir. 1993). Proceeding from that holding, the Tenth Circuit decided that the cause of action accrued under Section 2415(a) when the royalties became due, and that a

fact-specific inquiry governed the extent to which the limitations period may have been tolled by Section 2416(c) (under which the period does not run while "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances"). See 4 F.3d at 860-864.

The Tenth Circuit recently reaffirmed that "the statute of limitations commences to run in an action by the government to recover unpaid royalties from oil and gas leases when the government knew or should have known about the deficiency." *Mesa Operating Limited Partnership* v. *Department of Interior*, 17 F.3d 1288, 1291 (10th Cir. 1994). Although the lessee in *Mesa* was held to have waived the defense, "the statute of limitations would have been a defense to payment" had it not been waived. *Ibid.*

The conflict between the Tenth and Fifth Circuits on the application of Section 2415(a) to the federal scheme for collecting past-due royalties is especially significant in light of the disproportionate concentration of federally leased mineral production within those two circuits. Offshore oil and gas royalties account for more than three-quarters of all oil and gas royalties, MINERAL REVENUES 1993, *supra*, at 30, and more than 95% of OCS oil and gas royalties come from offshore Louisiana and Texas, both of which lie within the Fifth Circuit. *Id.* at 31. The Tenth Circuit is equally dominant with respect to *on*shore production. Leases in that circuit produced 92% of the gas, 72% of the oil, and 88% of the coal produced in onshore federal leases. *Id.* at 67.[7]

2. The decision of the Fifth Circuit also conflicts with the decisions of other circuits interpreting federal statutes of limitations. The principal points of dispute are the applica-

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[7] Most Alaskan leases have been transferred to Alaska Natives and are not managed by the MMS. See MINERAL REVENUES 1993, *supra*, at 47.

tion of Section 2415(a) to actions that are not garden-variety contract damages suits, and the application of statutes of limitations where the government proceeds initially by issuing an administrative order. This case offers this Court an opportunity to clarify the law in these important areas.

The Fifth Circuit offered two reasons why an action to enforce an administrative order to comply with a contractual royalty obligation by paying money is not an "action for money damages" within the terms of Section 2415(a). First, the government had not filed a "complaint" when it sought judicial aid to enforce its order; second, the sum of money that the government sought from Phillips was not "compensatory" and thus was not "damages." App., *infra*, 3a-4a.

Other courts of appeals have given a broader reading to the term "action for money damages" in Section 2415(a). For example, the Fifth Circuit's apparent view that a counterclaim cannot be a "complaint," and thus that its litigation is not an "action" under Section 2415(a), conflicts with a recent decision of the Ninth Circuit, *United States* v. *Toro*, 981 F.2d 1045, 1047 (9th Cir. 1992). In *Toro*, the court held that the government's motion to forfeit a bail bond was subject to the six-year limitation in Section 2415(a), even though the government's claim was asserted by motion within a pre-existing criminal action rather than in an independent lawsuit. Under the Ninth Circuit's reasoning, a complaint or counterclaim for an injunction enforcing an administrative payment order clearly is an "action" that is covered by the statute of limitations.

Moreover, courts regularly have found that government "claims to enforce notes, guaranties, or other contracts" to pay money are limited by Section 2415(a). *FDIC* v. *Bachman*, 894 F.2d 1233, 1237 (10th Cir. 1990). Section 2415(a) has been applied to bar actions seeking to recover deficiencies on promissory notes, although the related

equitable actions to foreclose mortgages were not barred. *United States* v. *Alvarado*, 5 F.3d 1425, 1428, 1430 (11th Cir. 1993); *United States* v. *Dos Cabezas Corp.*, 995 F.2d 1486, 1489-1490 (9th Cir. 1993). Under the logic of these cases, an action to collect a debt that is founded on a contract is not outside the scope of "action[s] for money damages" under Section 2415(a) simply because the action alternatively could be characterized as a request for specific performance of a contractual obligation to pay money. See *Dos Cabezas*, 995 F.2d at 1490. See also *United States* v. *Vanornum*, 912 F.2d 1023, 1025 (8th Cir. 1990) (applying § 2415(a) to an action to enforce loan guarantees); *United States* v. *Rollinson*, 866 F.2d 1463, 1465 (D.C. Cir.) (same), cert. denied, 493 U.S. 818 (1989); *United States* v. *Moore*, 968 F.2d 1099, 1101 (11th Cir. 1992) (an action to set aside a fraudulent conveyance is an action in quasi-contract and thus is covered by § 2415(a)). That logic—that the application of Section 2415(a) depends on the substance of a claim rather than its form—plainly encompasses an action to recover an oil or gas royalty.

The Fifth Circuit also held that "[a]gency orders are * * * not barred by the limitations period of § 2415." App., *infra*, 4a. That holding is in tension with the decision of the District of Columbia Circuit in *3M Co.* v. *Browner*, 17 F.3d 1453 (1994). That court held in *3M* that the five-year statute of limitations for any "action, suit or proceeding" to enforce a civil penalty (28 U.S.C. § 2462) applied to "civil penalty cases brought before agencies." 17 F.3d at 1455-1456. The court rejected the argument that only *judicial* actions, suits or proceedings could be barred as untimely: "Given the reasons why we have statutes of limitations, there is no discernible rationale for applying" a limitation when "an action or proceeding is brought in court, but not when it is brought in an administrative agency." *Id.* at 1457. Under the reasoning of the *3M* court, an MMS payment order—"the very act that initiates the actions leading to the collection" of

the royalty—would be barred directly if it was untimely under Section 2415(a). *Id.* at 1459 (quoting *Mullikin* v. *United States*, 952 F.2d 920, 933 n.1 (6th Cir. 1991) (Boggs, J., concurring in part and dissenting in part), cert. denied, 113 S. Ct. 85 (1992)).

The conflict among the circuits invites rampant forum-shopping by the government and lessees alike. Because a suit to enforce an MMS payment order may be brought where either the lease or the lessee is located (see 28 U.S.C. § 1391(b), (c)), the government will carefully choose its venue. A lessee initiating judicial review will do the same: Phillips had the option of bringing this action in the Fifth Circuit (where the leases are), the Tenth Circuit (where the alleged errors in royalty calculation occurred), or the District of Columbia Circuit (where the MMS and the Department are located). 28 U.S.C. § 1391(e). A lessee's liability for stale royalty obligations should not hinge on the location of the courthouse.

B. The Application of the Statute of Limitations to Federal Royalty Collections Is a Question of Exceptional and Recurring Importance

Even if there were no conflict in the circuits, the erroneous decision of the Fifth Circuit would be exceptionally important because of its surprising breadth—effectively removing all time limitations from government claims for recovery of lease royalties—and because most leased oil and gas production takes place within the territorial jurisdiction of that court. As noted above (at p. 12, *supra*), leases within the Fifth Circuit account for approximately three-quarters of all oil and gas royalties.

The MMS royalty management program is enormous. The MMS recovered $190 million in royalty underpayments in 1993. MINERAL REVENUES 1993, *supra*, at xi, 2. A single action to collect underpaid royalties may result in a million-dollar liability. *E.g.*, *Mesa*, 17 F.3d at 1290 n.1.

And one issue on the horizon—settlements of take-or-pay agreements made in the early 1980s—will require the MMS to evaluate the royalty status of $14 billion in revenues. MINERAL REVENUES 1993, *supra*, at xi, 1-2.

The decision below directly affects the holders of the 25,000 producing and producible federal leases by depriving them of the "settled expectations" that stale royalty claims "will be barred." *Tomanio*, 446 U.S. at 487. These lessees paid nearly $48 billion in royalties in the ten years ending 1993 (MINERAL REVENUES 1993, *supra*, at 13, 96) and account for nearly one-third of the domestic energy supply (see p. 4, *supra*), as well as significant proportions of other minerals. *Id.* at 24. Federal lessees now are at the mercy of the MMS's dilatory audit and collection procedure literally forever.

The question whether Section 2415(a) limits the MMS's ability to collect old royalties is recurring as well as important. Because the MMS increasingly orders lessees to pay royalties that were more than six years overdue, the limitations issue has arisen again and again in litigation before the district courts and the Interior Board of Land Appeals. See, *e.g.*, *Atlantic Richfield Co.* v. *Lujan*, 811 F. Supp. 1520 (N.D. Okla. 1992); *Anadarko Petroleum Corp.* v. *Babbitt*, No. 3:92-CV-885-X (N.D. Tex. Sept. 23, 1993) (reviewing *Anadarko Petroleum Corp.*, 122 I.B.L.A. 141 (1992)); *Enron Oil & Gas Co.* v. *Babbitt*, No. CV93-0980 (W.D. La.); *Amoco Production Co.* v. *Lujan*, Civil No. 92-3381 (E.D. La.); *Phillips Petroleum Co.* v. *Johnson*, No. 3:91-CV-1610-H (N.D. Tex.); *Phillips Petroleum Co.* v. *Kelly*, No. 3:89-CV-2670-H (N.D. Tex.); *Conoco, Inc.* v. *Lujan*, No. 3:89-CV-2551-G (N.D. Tex.); *Arco Oil & Gas Co.*, 131 I.B.L.A. 299 (1994); *Chevron U.S.A., Inc.*, 129 I.B.L.A. 151 (1994); *Texaco, Inc.*, 129 I.B.L.A. 46 (1994); *Marathon Oil Co.*, 128 I.B.L.A. 168 (1994); *BHP Petroleum (Americas) Inc.*, 124 I.B.L.A. 185 (1992); *Benson-Montin-Greer Drilling Corp.*, 123 I.B.L.A. 341 (1992) (1989 order seeking

compensatory royalties for 1971-1977); *Marathon Oil Co.*, 119 I.B.L.A. 345 (1991); *Mobil Exploration & Producing U.S., Inc.*, 119 I.B.L.A. 76 (1991); *Amoco Production Co.*, 114 I.B.L.A. 42 (1990); *Forest Oil Corp.*, 111 I.B.L.A. 284 (1989); *Foote Mineral Co.*, 34 I.B.L.A. 285, 85 Interior Dec. 171 (1978), rev'd on other grounds, 654 F.2d 81 (Ct. Cl. 1981).

Moreover, this case presents a question of still broader significance—whether the term "action for money damages" in Section 2415(a) contains an enormous loophole for a variety of actions filed by government agencies to obtain money judgments founded upon contracts. The Interior Board of Land Appeals has held consistently that Section 2415(a) does not apply to administrative payment orders issued by the MMS or other agencies in the Interior Department. *E.g.*, *Arco Oil & Gas Co.*, 131 I.B.L.A. at 304 (mineral royalty); *Quality Broadcasting Corp.*, 126 I.B.L.A. 174, 188 (1993) (communication site rental). Under that reasoning, combined with the holding below, any agency, in the Interior Department or elsewhere, can avoid the limitations period of Section 2415(a) simply by adjudicating contract disputes administratively and then suing to enforce an administrative order to pay. No time limit will ever apply at either stage of the proceeding. If exploited, that result could affect all persons doing business with the government. It certainly does not comport with the "reasons why we have statutes of limitations." *3M*, 17 F.3d at 1457. Because the limitations issue presented in this case not only affects the "massive economic endeavor" of federal oil and gas leasing, LAW OF FEDERAL OIL & GAS LEASES, *supra*, §1.01, at 1-3, but strikes more deeply at the system of enforcing contractual claims made by the government against private parties, the case warrants review by this Court.

C. The Fifth Circuit's Ruling That the United States May Collect Lease Royalties Without Any Limitation in Time Is Erroneous

The Fifth Circuit's resolution of the issue in this case cannot be justified. It gives the United States something that Section 2415(a) expressly denies—a limitless time to assert contract claims against private parties who enter into agreements with the government. The scant reasoning of the court of appeals cannot justify eviscerating Section 2415(a) as it applies to mineral leases or other contractual obligations that may be construed by an administrative agency in the first instance but that depend on the courts for ultimate adjudication and enforcement.

Section 2415(a) may apply to royalty collection efforts in either of two ways.[8] First, it may apply only to the government's judicial actions to enforce administrative payment orders (as well as to any traditional actions for breach of a royalty agreement that the government might bring). Under that view, which Phillips believes is the better one, the six-year period runs until the government files a complaint or a counterclaim in a district court. Alternatively, Section

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[8] Two issues not squarely presented in this case merit brief discussion. The government has contended that its cause of action for breach of the covenant to pay royalties does not *arise* until the MMS completes an audit and issues a demand. That contention is plainly wrong. As in contract cases generally, the cause of action accrues at the time of the breach. *Unexcelled Chemical Corp.* v. *United States*, 345 U.S. 59, 65 (1953); *Phillips* v. *Lujan*, 4 F.3d at 861. The government also has argued that the limitations period must be tolled under Section 2416(c) until the end of an audit. Tolling continues only while "facts material to the right of action are not known *and reasonably could not be known*" by the responsible official. 28 U.S.C. § 2416(c) (emphasis added). Once the government has a lessee's royalty payments and production reports, the generous six-year limitations period begins to run and, barring fraud or obstruction by the lessee, *includes* the time the government needs to complete its investigation of a possible claim.

2415(a) may apply directly to the MMS's administrative payment orders, on the theory that they serve the same function as complaints in royalty disputes between private parties, *i.e.*, providing notice of a formal demand for contract damages that may be enforced by resort to governmental power.

Whether the judicial claim or the administrative order stops the running of the limitations period, Section 2415(a) must apply to limit the government's recovery of stale royalties in some way. Procedural improvisations cannot override the general limitation imposed by Congress on contract actions.

1. *Section 2415(a) Applies to Any Judicial Action to Require a Lessee to Pay Royalties Claimed to be Due on a Mineral Lease*

To come within the terms of Section 2415(a), a proceeding must be an "action for money damages * * * which is founded upon any contract express or implied in law." That definition encompasses the typical MMS action to enforce an administrative order to pay past-due royalties.

a. When a separate claim is asserted in a judicial proceeding, even by motion, that assertion begins an "action" under Section 2415(a). See *Toro*, 981 F.2d at 1047. Either a complaint or a counterclaim for an injunction enforcing a payment order clearly is such an "action."

The statutory language of Section 2415(a) compels the conclusion that an action to enforce an administrative decision may be subject to the limitations period. The statute quite plainly contemplates that in some instances "administrative proceedings" would precede the filing of an "action for money damages"; thus, when such "proceedings" are "required by contract or by law," Section 2415(a) extends

the limitations period for one year after they are concluded.[9] Yet the ensuing court "action" undeniably is covered by Section 2415(a), even though the action may be in essence judicial review of the administrative body's decision rather than a *de novo* legal action.[10]

The Fifth Circuit's contrary view reduces to absurdity the statutory provision for "required administrative proceedings." *Mandatory* administrative proceedings extend the statute of limitations at most a year beyond their conclusion; if the government does not file a judicial proceeding to enforce the administrative determination within that time, the contract rights become unenforceable. According to the Fifth Circuit,

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[9] The extension of the limitations period for "one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law" does not apply to the MMS enforcement actions at issue in this case. No statute, regulation, or provision of the lease *requires* the government to issue an administrative payment order before suing in court. The government has sometimes brought contract lawsuits against lessees who breached covenants to pay money. *E.g.*, *United States* v. *Essley*, 284 F.2d 518 (10th Cir. 1960). Indeed, the FOGRMA explicitly authorizes a *State*—regardless of any MMS administrative action—to "commence a civil action * * * against any person to recover any royalty * * * which the State believes is due * * * with respect to any oil and gas lease on Federal lands located within the State." 30 U.S.C. § 1734(a). It is plainly "apparent that the United States * * * could have brought suit without first resorting to administrative remedies." *Crown Coat Front Co.*, 386 U.S. at 519.

[10] This clearly is the case when the United States sues to enforce a contract that is subject to a typical disputes clause. See 41 U.S.C. § 605(a) (Contract Disputes Act of 1978); *Crown Coat Front Co.*, 386 U.S. at 505-506 (describing "standard disputes clause"); H.R. Rep. No. 1534, *supra*, at 4 (one-year extension applies to disputes clause proceedings); S. Rep. No. 1328, *supra*, 1966 U.S.C.C.A.N. at 2504. In that situation, contractual disputes must be submitted to an agency board of contract appeals; a court gives the board decision deferential review like that given an agency decision under the Administrative Procedure Act. Compare 41 U.S.C. §§ 321-322, 609(b) with 5 U.S.C. § 706.

however, a *purely optional* administrative process like the one that MMS pursues can eradicate the statute of limitations altogether. That cannot be right.[11]

As for the other terms of Section 2415(a), there can be little dispute that the obligation to pay royalties is "founded upon a contract," *i.e.*, the lease. The royalty clause creates an "obligation of the lessee * * * to pay money in an amount which is capable of being ascertained." 3 E. KUNTZ, LAW OF OIL & GAS § 44.1, at 461 (1989). A lessee who does not "make such payment when it is due is liable to the lessor for breach of a covenant to pay money," and is subject to an "action for damages for failure to pay royalties." *Ibid.*

b. The Fifth Circuit held, however, that an action to recover royalties is not an action for "money damages." The court relied on *Bowen* v. *Massachusetts*, 487 U.S. 879 (1988), in which this Court held that an action for judicial review of an administrative decision denying a reimbursement to which the plaintiff claimed statutory entitlement was not an action for "money damages." Therefore, the action was not relegated to the Claims Court, but came within the waiver of sovereign immunity in the Administrative Procedure Act, 5 U.S.C. § 702. The *Bowen* Court contrasted an "action at law for damages—which are intended to provide a victim with monetary compensation for an injury" with "an equitable action for specific relief—which may include an

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[11] This does not mean that the MMS cannot engage in lengthy administrative review if it so desires. The agency merely has to take the same precautions as a private litigant similarly situated: either the MMS must obtain a waiver of the statute of limitations from the lessee, or it must file a protective lawsuit in district court. As this Court has recognized, the "fact that due deference to the administrative process should make a court hold its hand until the administrative proceedings * * * have been completed is a matter of judicial administration and of no relevancy" to the government's obligation under the statute of limitations to assert its rights properly and in a timely fashion. *Unexcelled Chemical Corp.*, 345 U.S. at 66 (citations omitted).

order providing for * * * the recovery of specific * * * monies." 487 U.S. at 893 (internal quotation marks omitted).

The analysis used in *Bowen* is problematical, however, when stretched to apply to an action founded on a contract. The government in fact acknowledged in this case that an overly literal application of *Bowen* to the issues raised by Section 2415(a) would not comport with common sense. It stated in the district court that a counterclaim "requesting an injunction enforcing orders requiring * * * payment of money" is a "complaint for money damages" under Section 2415(a). Memorandum in Support of Summary Judgment on Counterclaim 10 (Jan. 29, 1993). "Nothing in *Bowen* purported * * * to declare that a suit to enforce an order to pay does not constitute a suit for money damages within the meaning" of Section 2415(a). *Id* at 14.

Elsewhere, too, the government has acknowledged the breadth of Section 2415(a), pressing this Court for a common-sense reading of the phrase "action for money damages." When the government needed the shelter of the six-year limitations period in Section 2415(a), it characterized a contractual action for "money had and received" as an action for money damages. See *United States* v. *California*, 113 S. Ct. 1784, 1787-1788 (1993). The action for "money had and received" is what the *Bowen* analysis might characterize as an equitable action for the payment of specific money.

But under traditional views of contract actions, "a suit seeking to recover a past due sum of money that does no more than compensate a plaintiff's loss is a suit for damages, not specific relief." *Bowen*, 487 U.S. at 918 (Scalia, J., dissenting). In particular, an action to recover underpaid royalties is not an action for specific performance of the royalty agreement, but rather an action for damages for breach of the covenant to pay royalties—even though the

measure of the damages is the amount of royalties due.[12] The order to pay money in compensation for breach of a covenant to pay money gives the plaintiff the equivalent of specific relief, but the remedy remains one of damages. See, *e.g.*, 3 E.A. FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.4 (1990).

Bowen's narrow reading of the term "money damages" should be confined to cases presenting circumstances similar to that case, and "should not be treated as a widely applicable, general rule for determination of the nature of the relief sought." *Native Village of Noatak* v. *Blatchford*, 38 F.3d 1505, 1513 (9th Cir. 1994). *Bowen* involved an attempt by the government to use a broad reading of "money damages" to deny litigants access to judicial review of administrative action in the district courts, while this case involves an attempt by the government to narrow the meaning of "money damages" in order to evade legislative limitations on its own power to sue.

Giving the terms in Section 2415(a) their "ordinary meaning," *Asgrow Seed Co.* v. *Winterboer*, 63 U.S.L.W. 4055, 4058 (U.S. Jan. 18, 1995), the term "money damages" appropriately reflects "the indiscriminate use of the word 'damages' in describing any award of money in an action based on contract, including instances in which the award amounts to specific relief." Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1157 (1970). For centuries, an action upon a contract for payment of a sum has been "nominally an action for damages" and "damages [have been] nominally recovered in it." *Robinson*

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[12] 3 E. KUNTZ, *supra*, § 44.1 at 461; 3 H. WILLIAMS & C. MEYERS, OIL & GAS LAW § 656.5, at 727 (1994). Cf. 3 D. DOBBS, LAW OF REMEDIES § 12.12(1), at 307, § 12.13, at 331 (2d ed. 1993) (distinguishing "action for the price" from action for specific performance); *id.* § 12.15(3), at 350 n.1 (action to recover back rent may be action for damages for breach of covenant to pay).

v. *Bland*, 2 Burr. 1077, 1086, 97 Eng. Rep. 717, 722 (K.B. 1760) (Mansfield, J.). This Court should not assume that the members of Congress were pedants who intended silently to carve out a huge loophole in Section 2415(a) based on an obscure and stilted characterization of a common contractual remedy. The scheme of Section 2415 does not evince any intention to leave any class of actions immune from limitation.

c. The structure of the statute, too, indicates that Congress intended to subject all contract actions to the six-year limit; the statute enumerates specific exceptions, such as contracts involving title to and possession of land (28 U.S.C. § 2415(c)). It seems curious at best that Congress would *exempt* from *all* limitations contracts that involved only the payment of money, such as loans (and loan guaranties) and mineral royalties. To the contrary, in enacting Section 2415(a) Congress clearly desired to put private litigants on equal footing with the government. *Crown Coat Front Co.*, 386 U.S. at 521 & n.14. A lessee who pays a disputed royalty and then sues for a refund is bound by a general limitations provision, 28 U.S.C. § 2401. Under those circumstances, it is difficult to understand why the government should have an unlimited time to pursue its remedies.

The legislative history dispels any doubt that an "action for money damages" under Section 2415(a) includes an action to enforce the payment of a sum owed under a contract. Both the Senate and the House Reports explained that Section 2415(a) "provides for a 6-year limitation which would apply to *all* Government actions based on contracts." S. Rep. No. 1328, *supra*, 1966 U.S.C.C.A.N. at 2504 (emphasis added); H.R. Rep. No. 1534, *supra*, at 4. The object of the legislation was "to provide a fair procedure which would have the effect of ending the possibility of *contracts litigation* after a fixed period." H.R. Rep. No. 1534, *supra*, at 8 (emphasis added). The Johnson Administration—which proposed Section 2415—quite clearly consid-

ered the six-year limitation to apply to "the assertion of Government claims *for money* arising out of an express or implied contract." Letter from Nicholas deB. Katzenbach, Attorney General, to Speaker of the House, reprinted in H.R. Rep. No. 1534, *supra*, at 11 (emphasis added). And the Senate sponsor used the same terms in his explanatory floor statement—the sole such floor statement in either house of Congress. 112 Cong. Rec. 14,378 (1966) (statement of Sen. Ervin). Thus, the legislative committees, the Senate sponsor, and the executive branch agreed that Section 2415(a) applied to all pecuniary contract claims asserted by the United States.

2. *At a Minimum, Section 2415(a) Applies to Administrative Orders to Pay Royalties*

Phillips' primary position, as argued above, is that the statute of limitations requires the government to file a judicial action on its contract claim within six years of the date when the underpayment occurred (leaving aside possible tolling). But if the court of appeals is correct that a judicial action to enforce an administrative payment order is not an "action for money damages" within the meaning of Section 2415(a), it hardly follows, as the court further held (App., *infra*, 3a & n.1), that government efforts to enforce pecuniary rights under mineral leases are free from *any* period of limitations. At most, it would mean that the government can act to end the running of the six-year limitations period by issuing an administrative payment order. See *3M*, 17 F.3d at 1457. No reasonable interpretation of Section 2415(a) permits the MMS to wait forever to bring its contractual claim.

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In enacting the FOGRMA, Congress evidently assumed that the six-year limitation of Section 2415(a) would bar stale claims for unpaid royalties. The six-year record retention requirement in the FOGRMA is an express acknowledgement that royalty claims more than six years old are presumptively stale. See 30 U.S.C. § 1713(b). Cf. 5 C.F.R. § 1320.6(f)

(1994) (federal agencies normally authorized to require record retention for no more than three years). In addition, the only statute of limitations in the FOGRMA—relating to civil penalty actions—replicates the six-year standard of Section 2415(a). See 30 U.S.C. § 1755. In sum, for royalty contracts, as for other government contracts, Congress believed that a six-year period was sufficient to preserve the government's rights.

As Assistant Attorney General Douglas testified in presenting the original draft of Section 2415 to Congress, "potential defendants are entitled eventually to put to one side thoughts of possible suits against them." *Improvement of Procedures in Claims Settlement and Government Litigation: Hearings on H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182 Before Subcomm. No. 2 of the House Comm. on the Judiciary*, 89th Cong., 2d Sess. 7 (1966). The decision of the Fifth Circuit allows the government to thwart that "policy of repose" (*ibid.*), and merely by engaging in administrative improvisation to "create the anomaly of a distinct class of actions subject to no limitation whatsoever" in spite of Congress's clearly contrary will. *Campbell* v. *Haverhill*, 155 U.S. 610, 616 (1895). This Court should grant review in order to restore to mineral lessees and other contractors the protection that Congress intended.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1995